SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 13

ANTHONY CRAMER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

HAROLD R. MEDINA,
Counsel for Petitioner;
JOHN MCKIM MINTON, JR.,
RICHARD T. DAVIS,
Of Counsel.

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REPLY BRIEF FOR PETITIONER.

I.

For his second point set forth in his main brief petitioner contends that the District Court erred in submitting to the jury Overt Acts 1, 2 and 10 on the ground that such acts were legally insufficient in that they did not openly manifest treason. Respondent in its brief misinterprets petitioner's contention that to be legally sufficient an alleged overt act of treason must openly manifest treason.

Petitioner does not argue, as the respondent assumes he does, that the overt act must of itself and apart from other

evidence comprehend and establish the whole crime of the treason of adhering to the enemy. Apart from the proof of the overt act it may be shown, of course, that the accused owed allegiance to the United States, that the persons with whom the accused had his allegedly treasonable dealing were enemies of the United States. Furthermore, evidence apart from evidence of the overt act may probably be given to show that the accused had a treasonable design. However, the overt act of the treason of adhering to the enemy must of itself manifest treason in the sense that it must of itself give color and credence to the existence of the treasonable design. It must be within those species of acts, recognized by authorities such as Blackstone and Foster (see Pet. Br. pp. 24-25) to be sufficient overt acts of the treason of adhering to the enemy. It is in this sense that the authorities use the term "manifest", and it was with this thought in mind that this Court has required, in the case of the treason of levying war, that there be shown an actual assemblage of men gathered together for the execution of a treasonable purpose (Pet. Br. p. 34 fn.). As pointed out in petitioner's main brief (p. 23), if the rule of law were otherwise, if the overt act can be some insignificant and on its face innocent and harmless circumstance, having no apparent and necessary relation to the treasonable design charged against the accused, then it is no protection to the accused that such an act be testified to by two witnesses.

There is admittedly precedent for an exception to the general rule that an overt act to be legally sufficient must of itself manifest treason. This exception, one which is not in point in this case, is found in Lord Preston's case (*Rex v. Sir Richard Grahme* [1691], 12 How. St. Tr. 646), which is heavily relied on by respondent (Res. Br. pp. 41ff) and which is discussed in petitioner's main brief at pages 27-29.

The exception is this: once there is alleged and proved a proper overt act of treason, then any step taken in preparation for that overt act is itself an overt act although standing alone it would not be an overt act.[1]

Inasmuch as under the rule for which respondent contends[2] each and every overt act may of itself be an entirely innocent act,[3] the rule goes far beyond the rule set forth in

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[1] Petitioner does not assume, as respondent states he does (Res. Br. p. 47), that Lord Preston actually succeeded in carrying the papers into France. The fact is, and it is so stated in petitioner's main brief at page 28 that Lord Preston and his company set sail in the County of Surrey but were apprehended in the County of Kent. In his charge to the jury (Pet. Br. p. 28, Res. Br. pp. 46-47), Lord Chief Justice Holt required the jury to find first that Lord Preston was going into France with the papers to excite an invasion of England, which was one of the overt acts alleged, and stated that having made this finding the jury might find that any act taken in preparation for that overt act was itself an overt act of treason, even though the step taken in preparation for the overt act was on its face innocent, such as going on board the ship in the County of Middlesex.

There was uncontroverted evidence that Ashton, Burdet, and Elliot hired the boat in which Lord Preston was apprehended, for the purpose of going to France (685). After the boat left the County of Surrey, it was the practice of the members of the party to hide in the hold, on the ballast, when another vessel approached (689), and Lord Preston and the others were found thus hiding when Captain Billop and his crew apprehended and searched the boat (696, 701). Billop brought Lord Preston and the others up from the hold. Ashton, however, went down again into the hold, pretending to look for his hat, and while there was seen to take something from the ballast and cram it into his bosom (701). The member of Billop's crew who saw this told Billop, and Billop searched Ashton and found the packet of treasonable papers (697). Some of these papers were in Lord Preston's handwriting and some of them bore his seal (726). Lord Preston offered to do Billop any service that lay in his power if Billop would dispose of the packet (698).

[2] "The act must, we believe, be a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, giving them aid and comfort" (Res. Br. p. 35).

[3] "But we do not understand the authorities to require that this fact — the actual or intended giving of aid and comfort — must, any more than the intent of the actor, appear on the face of the act or be proved by two witnesses who testify to the act. If the act be proved by testimony of two witnesses, its tendency to effectuate the design of aiding the enemy may be shown by other competent evidence" (Res. Br. p. 36).

Lord Preston's case which is itself regarded by Holdsworth as a constructive extension of the crime of treason (Pet. Br. p. 29).

Furthermore, even under the rule proposed by respondent it would seem necessary that the "program or course of action" of which the overt act is alleged to be a part must necessarily be a program or course of action formulated and agreed upon prior to the overt act. Otherwise the act cannot be said to be part of the program. There is no evidence, however, from which it can be inferred that petitioner was a party to a program of treason prior to his alleged commission of Overt Acts 1 and 2. While Agent Ostholthaff testified that petitioner told him that he had learned from Thiel that Thiel was on a mission for the German Government (R. 154-155), and while Norma Kapp testified to certain information concerning Thiel related to her by petitioner (R. 177-178), there is no evidence that petitioner learned any of this matter before the alleged commission of Overt Acts 1 and 2. Thus, even by its own test, the respondent's case fails.

Moreover, the exception found in Lord Preston's case can in no event sustain the government's case, since petitioner urges (Pet. Br. p. 29) that all the alleged overt acts were insufficient, and even if one or two of the three submitted to the jury were sufficient, there is nothing in the jury's verdict to indicate that it found a sufficient overt act to be proved. Furthermore, no overt act submitted to the jury in this case can be said to be an act in preparation for any other act alleged to be an overt act in the way that going aboard the ship in Middlesex was preparatory to the design of carrying treasonable papers on that ship into France.

Respondent cites *Trial of David Maclane* [1797] 26 How. St. Tr. 721, as an English case supporting the proposition that the overt act is not required itself to disclose the accused's treasonous intent (Res. Br. p. 48). But this ques-

tion was not an issue in that case. Counsel for Maclane contended that the proof was deficient in that there was no proof that Maclane had actually given aid and comfort to the enemy (785). Whether or not the aid sought to be given the enemy had to be successfully rendered to constitute treason was the question of law before the Court, as is evidenced by the very quotation from the case presented by respondent (Res. Br. pp. 48-49). The Court decided that the aid need not be successfully rendered.*

In the *Maclane* case there were alleged fourteen overt acts consisting variously of such acts as soliciting the King's enemies to invade the province, soliciting the King's subjects to levy war against the King, raising men to levy war against the King, conveying arms and ammunition into the province for the purpose of waging war against the King, collecting information whether the King's subjects were or were not well affected, and whether or not they would join the enemy in a hostile invasion of the province, acquiring knowledge of the strength of the City of Montreal and how it might be attacked, with intent to communicate it to the enemy. Then, in the overt act referred to in respondent's brief (p. 48) it was alleged that having then there in his possession the information as to whether the King's subjects were or were not well affected, whether or not they would join the enemy in a hostile invasion of the province, and concerning the strength of Montreal, he departed from Quebec towards foreign parts, with intent to communicate it to the enemy. On the trial a witness testified (771-772) that Maclane told him in Vermont, in the United States, that he had just left Montreal and was on

* Petitioner agrees with the proposition stated in respondent's brief (p. 35 fn.) that the treasonable design need not have been successfully accomplished to constitute treason. This was also the sole point of law involved in *Rex* v. *Vaughan*, cited in petitioner's brief at page 30, and in respondent's at page 49.

his way to Philadelphia with the information concerning the disposition of the people of Quebec toward the King, for the purpose of giving it to a Mr. Adet, a representative of the French Government residing in Philadelphia. France was at war with England and Maclane was a spy in the employ of the French. There can be no doubt that all the overt acts in the case manifested treason.

The case of *United States* v. *Pryor*, 27 Fed. Cas. 628, Case No. 16,096, cited by respondent at page 51 of its brief, actually supports the rule of law for which petitioner contends, and lends further doubt that the Court in *United States* v. *Lee* (cited in petitioner's brief, p. 34, respondent's brief, p. 51), held or intended to hold that the purchase of watermelons was a sufficient overt act of treason.

In the *Pryor* case, the only overt acts apparently relied on by the Government were allegations that the defendant undertook to procure provisions for the use of the enemy, and that he proceeded from an English boat to the shore with that intent. Defendant admitted doing these acts with the intent alleged. But the Court held that these acts did not amount to an overt act of treason, and so instructed the jury which gave its verdict of not guilty without leaving the bar. The Court stated, at page 630, that while undertaking to procure provisions was not a sufficient overt act of treason, the carrying of the provisions towards the enemy would have been sufficient:

> "Can it be seriously urged that if a man, contemplating an adherence to the enemy, by supplying them with provisions, should walk toward the market-house to purchase, or into his own fields to slaughter whatever he might find there, but should, in fact, do neither one or the other of the intended acts, he has committed an overt act of adhering to the enemy? Certainly not. All rests in intention, merely, which our law of treason in no instance professes to punish. Carrying provisions

towards the enemy, with intent to supply them, though this intention should be defeated on the way, would be very different from the act of going in search of provisions for such a purpose, and stopping short before any thing was effected, and whilst all rested in intention."

So in our case, for example, the meeting without more between petitioner and Thiel is not an overt act of treason. But if there could have been alleged and proved as an overt act that at this meeting the parties made and discussed plans for aiding the enemy, this would doubtless have been a sufficient overt act of treason. At the mere meeting all rests in intention only; on conspiring at the meeting to aid the enemy, the treasonable intention becomes manifest.

II.

For his third point set forth in his main brief petitioner contends that Overt Act 10 should not have been submitted to the jury for the additional reason that petitioner's statements, which form the substance of that Act, were made by him subsequent to the time he was taken into custody but prior to the time of his arraignment. In his opening brief petitioner made two contentions on this point: (1) that testimony concerning statements made by petitioner while under illegal restraint should not have been admitted in evidence; (2) that statements procured by Government Agents by illegal means cannot constitute an overt act of treason. In its brief respondent treats only the first of these propositions, and we again bring the second to the notice of the Court for the reason that, as stated in petitioner's main brief at page 42, it is believed to raise a separate question of the most fundamental import.

III.

For his fourth point set forth in his main brief petitioner contends (A) that the District Court erred in submitting to

the jury Overt Acts 2 and 10 on the further ground that the allegations thereof had not been proved by the testimony of two witnesses; and (B) that the Court erred in charging the jury with respect to the requirement of proof by two witnesses to each overt act.

Petitioner contends that Overt Act 2 was not proved by the testimony of two witnesses. Overt Act 2 alleges in part that petitioner "did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn * * * and at Thompson's Cafeteria * * *". In his main brief (at p. 43) petitioner argues that each of these conferences and meetings were not testified to by the same two witnesses. Respondent states (Res. Br. p. 72) that this contention is not sustained by the record, that Agents Willis, Fisher, and Rice testified to the meeting in the Twin Oaks Inn and that these three, along with Agent Stanley, testified to the meeting in Thompson's Cafeteria (Res. Br. p. 72).

Respondent first confuses Overt Acts 1 and 2. Overt Act 1 alleges a meeting at the Twin Oaks Inn between petitioner, Thiel, and Kerling. Overt Act 2 alleges two meetings between petitioner and Thiel alone. The meeting between petitioner and Thiel at the Twin Oaks Inn was testified to by Agents Rice (R. 80-81) and Willis (R. 101-102). But Agent Fisher did not testify to this meeting. While Fisher testified to the meeting alleged in Overt Act 1, that is, the meeting between petitioner, Thiel, and Kerling (R. 73-74), he left the Twin Oaks Inn when Kerling did, in order to follow him (R. 74), and returned to the Twin Oaks only to observe petitioner and Thiel leaving the Twin Oaks (R. 74).

Agents Rice and Willis testified to the first part of Overt Act 2 and Agent Rice testified to the second part of this Act (Res. Br. p. 43). The question then is whether Agent

Willis can be said to have testified to the second part. He testified that petitioner and Thiel went into Thompson's Cafeteria, stayed there a while having refreshment, and came out (R. 102). It is submitted that this is not testimony that petitioner "did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at * * * Thompson's Cafeteria * * *."

But petitioner's fourth point is valid even if the same two witnesses are deemed to have testified to each part of Overt Act 2. The Court charged the jury that "Where the overt act is separable into parts, that is, continuance and composite act made up of several circumstances and passing through several stages, there must be two direct witnesses to each part of the act, but they need not be the same two witnesses who testified to other parts of the act, so long as each part of the overt act is supported by the testimony of two witnesses" (R. 442). Thus, even if Agents Fisher, Willis and Rice each testified to both parts of Overt Act 2, the jury could have found, for example, that the first part of Overt Act 2 was proved only by the testimony of Willis and Rice and the second part only by the testimony of Rice and Stanley.[5] Thus the jury could have found that Overt Act 2 was proved as to each of its parts by two different sets of witnesses. This, petitioner submits, was reversible error.

Petitioner's fourth point pertains to Overt Act 10 in that the following part of that Act as alleged was testified to by one witness only (Pet. Br. p. 44): "and was kept by him in a safe deposit box because he considered it safer there than in his savings account in said bank." Respondent contends, however, that the requirement of a second

[5] Agent Stanley testified to the second part of Overt Act 2 at R. 84.

witness is supplied by petitioner's own testimony (Res. Br. pp. 75 ff.).

Article III, Section 3 of the *Constitution of the United States* provides, in part, that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Concededly petitioner's testimony does not constitute a confession in open court (Res. Br. pp. 77-78). It is submitted that any defect in the proof of an overt act by two witnesses cannot be supplied by the accused's own testimony. The Constitutional provision clearly provides for two alternatives: testimony by two witnesses to the same overt act; confession of the crime by the accused in open court. The accused can secure his conviction only by confession in open court. He cannot be convicted on his testimony to the doing of the overt act so long as that testimony remains something less than a confession.

That petitioner's argument is sound is demonstrated by the history of the two-witness requirement in treason. As stated in petitioner's main brief (p. 21), this requirement is first found in the English statutes 1 Edward VI C. 12, § 22 and 5, 6 Edward VI, C. 11, § 12. 1 Edward VI provided in part that no person should be convicted of high treason, "unless the same offender, speaker, offenders or speakers, be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same." 5 and 6 Edward VI so far as it pertained to the two-witness rule provided as follows:

> "Provided always, and be it enacted by the authority aforesaid, That no person or persons, after the first day of *June* next coming, shall be indicted, arraigned, condemned, convicted or attainted for any of the treasons or offences aforesaid, or for any other treasons that now be, or hereafter shall be, which shall hereafter be perpetrated, committed or done,

unless the same offender or offenders be thereof accused by two lawful accusers; (2) which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that they have to say against the said party, to prove him guilty of the treasons or offences contained in the bill of indictment laid against the party arraigned; unless the said party arraigned shall willingly without violence confess the same; * * *."

The characterization of the two required witnesses as "accusers", and the requirement that they be brought before the party accused, would certainly seem to indicate that one of the two required witnesses cannot be the accused himself.

While the later English statute, 7 William III, does not use the same language as the prior statutes, there is no indication in the cases or in the texts that this statute changed the rule with regard to the identity of the witnesses required. This statute, in so far as it sets forth the two-witness rule, provides as follows:

"And be it further enacted, That from and after the said five and twentieth day of *March*, in the year of our Lord one thousand six hundred ninety six, no person or persons whatsoever shall be indicted, tried or attainted, of high treason, whereby any corruption of blood may or shall be made to any such offender or offenders, or to any the heir or heirs of any such offender or offenders, or of misprision of such treason, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; unless the party indicted, and arraigned, or tried, shall willingly, without violence, in open court, confess the same, or shall stand mute, or refuse to plead, or in cases of high treason shall peremptorily challenge above the number of thirty five

of the jury; any law, statute, or usage, to the contrary notwithstanding."

Since this statute permitted one witness to establish one overt act, and another witness another overt act of the same treason (a provision not adopted in this country), it seems clear that it was not intended that the accused should by his own testimony establish an overt act, especially in view of the particularity with which the statute sets forth the acts in open court by which the accused could secure his conviction.

IV.

In conclusion, we ask the Court's consideration of each and every one of the points set forth in the Assignments of Error (R. 460-473), no one of which is waived although not argued *in extenso*. The purport of those not previously adverted to in our briefs is evident on their face, and at least one of them was commented upon in the opinion of the Circuit Court (R. 487-8).

V.

The Judgment Appealed from Should Be Reversed and the Indictment Dismissed or, in the Alternative, a New Trial Ordered.

Dated: New York, March 9th, 1944.

Respectfully submitted,

HAROLD R. MEDINA,
Counsel for Petitioner;
JOHN McKIM MINTON, JR.,
RICHARD T. DAVIS,
Of Counsel.